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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re the Marriage of GEORGE A. and CATHY J. HEINER.	
GEORGE A. HEINER, Respondent, v. CATHY J. CHANDLER, Appellant.	A107485 (Alameda County Super. Ct. No. H-180254-6)

The question posed in this appeal is whether a lump sum, unallocated personal injury recovery is income, as defined by Family Code[1] section 4058, for purposes of calculating child support. We here decide (1) *the entirety* of an undifferentiated lump sum personal injury recovery is not income for purposes of child support, and (2) the determination as to whether *some portion* of an undifferentiated recovery is allocable as income must be left to the discretion of the trial judge.

In this case, the trial court correctly treated the recovery as a fund, and did not err in denying a request for allocation of a portion of the recovery as income. The court's other rulings, regarding the parties' respective incomes and regarding attorney fees, were also sound. Accordingly, we affirm the order.

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of footnote No. 9 and parts I.A.2.; I.B.2.; I.B.3.b., c., d.; and III.C., D., E., F.

[1] All statutory citations are to the Family Code unless otherwise indicated.

I. PROCEDURAL AND FACTUAL BACKGROUND

George A. Heiner and Cathy J. Chandler[2] were married in May 1993 and separated in November 1994. The marriage produced two daughters. George filed a petition for legal separation on November 21, 1994.[3]

A. First Trial

1. Original Order on Parenting Schedule and Child Support

It appears the parties could not reach agreement on custody, visitation, support, division of property, health insurance, medical expenses and attorney fees, and so proceeded to trial on those issues. The proceedings took place on seven days over a period of 15 months. In May 1997, the court issued its statement of decision, giving the parents joint physical and legal custody of the children, setting a temporary parenting schedule pending further evaluation, and ordering George to pay to Cathy $327 per month in child support.

2. Order re Attorney Fees

After deciding the remaining disputed issues, the court ordered Cathy to pay $10,000 of George's attorney fees in the form of a sanction under section 271, subdivision (a).[4] The case was described as "unique because of the degree of fraud, deception and obstruction practiced by Cathy." Some examples: Cathy falsified her tax returns to show only one-fifth of her true income; Cathy admitted she made a false income statement in her income and expense declaration; and Cathy had previously

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[2] For ease of reference, we shall use the parties' first names. We mean no disrespect in so doing.

[3] Although Cathy's response to the petition is not before us, we surmise from the court's statement of decision, reciting that a judgment of dissolution (status only) had been entered, that she requested a dissolution.

[4] Section 271, subdivision (a) provides, in part: "Notwithstanding any other provision of this code, the court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney's fees and costs pursuant to this section is in the nature of a sanction."

claimed she had income of $1,500 per month but then admitted at trial she received $2,250. According to the court, Cathy "manifested no humiliation, embarrassment or remorse when she admitted these falsehoods." Judgment was entered on June 10, 1997.

B. Second Trial

In May 2000, George filed a motion requesting modification of the court's order with respect to visitation and child support. Cathy opposed the motion, and the matter was set for hearing in June 2001. For reasons not revealed in the record, the hearing did not commence until July 2002. The proceedings in July 2002, October 2002 and on February 25, 2003, involved almost exclusively the issues of custody and visitation.[5] Further hearings took place on February 26, 27, and 28, and on July 30, 2003. These related to financial issues underlying the calculation of child support, which issues are the subjects of this appeal.

1. Evidence of George's Financial Circumstances

George worked as a dentist for about 10 years, but became disabled from practicing dentistry after he was injured in an incident at a Kmart store in March 1995. He filed suit, and after a trial the jury returned a verdict in January 1999 awarding $3.8 million in damages. The verdict did not separately state amounts for the various types of damages. Kmart did not pay the judgment, but instead appealed and posted an appeal bond. In October 2000, the verdict was upheld.[6] Kmart and George then entered into a settlement agreement. According to George, Kmart balked at paying the full amount of interest due on the judgment and George, therefore, accepted a settlement in an amount less than the full sum then due. The agreement characterized the entire sum paid as "damages on account of physical and personal injuries." The agreement also made

[5] The court's order regarding the parenting schedule is not challenged on this appeal.

[6] *Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335 (*Kmart*).

reference to Internal Revenue Code section 104(a) for tax reporting purposes.[7] George did not declare any portion of the settlement proceeds as interest income, because the agreement called for an undifferentiated payment that eliminated any interest component. George admitted on cross-examination that he received about $500,000 more than he would have received had the judgment been paid when entered, but would not agree with counsel's characterization of that amount as "interest." George also testified that he "had more debt because of the delayed payment . . . ."

George received $2,364,500 from the settlement with Kmart, after deducting attorney fees and costs.[8] From the proceeds of the settlement, George paid off a number of debts and purchased a residence. He used most of the remainder to invest in real estate and stocks. He also opened a money market account. He testified that his net worth (as of February 2003) was $1.2 million to $1.3 million in real estate plus about $548,000 in other investments and accounts (including his IRA).[9]

2. Evidence of Cathy's Financial Circumstances

Prior to May 2000, Cathy began living with Craig Schwab at his residence. Schwab supports Cathy and the two Heiner children when they are with their mother. Schwab is the father of Cathy's third daughter, Alyssa. Until January 2001, Schwab had been the lessee and/or manager of a large number of gas stations. It is undisputed that Cathy "lives with a wealthy individual in an opulent setting."

Cathy has an ownership interest in Portola Food and Liquor (PF&L), a gas station and convenience store. During a prior hearing in this case, Cathy stated she owned the

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[7] Internal Revenue Code section 104(a) provides, in pertinent part: "[G]ross income does not include—[¶] . . . [¶] (2) the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness . . . ."

[8] Cathy argued that George received a $2.8 million net recovery. The court found the net recovery was $2,364,500. This number is not challenged on appeal, nor is it germane to the issues before us.

[9] Other testimony pertinent to George's financial circumstances and the issue of earning capacity is discussed later in this opinion, as relevant. (See part III.D., *post*.)

business in name only and received none of the profits. In this proceeding, Cathy acknowledged she owned the liquor license, but denied owning the entire business. According to George, Cathy owns the entire business and must report as income all of the cash flow from that business. The evidence on this issue is sharply disputed.

a. Cathy's Evidence Regarding Ownership of PF&L

Schwab is the sole owner of T. J. Kristi Corporation (T. J. Kristi) which, prior to January 2000, had been negotiating to buy PF&L. About three years earlier, C & J Cox Corporation (Cox) had sold a nearby competing business to one Mr. Sandhu; the transaction included a covenant not to compete. Schwab had done consulting work for Cox and had arranged the sale of its business to Mr. Sandhu. Although neither Schwab nor T. J. Kristi was subject to the covenant not to compete, Cox asked Schwab not to put PF&L in Schwab's name "to avoid any implication of a lawsuit." In January 2000, Schwab and Cathy entered into an agreement reciting these facts and providing that "even though the liquor license is being transferred into Cathy's name, that the business and all its assets will be owned by T. J. Kristi Corporation." The agreement provided that all payments to sellers, to employees and to the tax authorities would be made by T. J. Kristi, all bank and credit accounts would be in the name of T. J. Kristi, and "all profits derived from the business shall be deemed to be the profits of T. J. Kristi Corporation." The agreement further states: "[B]oth parties, by their signatures below, acknowledge that they understand that T. J. Kristi Corporation is the rightful owner of the assets, and Cathy Chandler has no right to any of the assets of the business."

PF&L was purchased in February 2000. According to Schwab, T. J. Kristi paid most of the down payment, Schwab's residence was used as security for the promissory note, and Schwab was either a co-obligor or a guarantor on the promissory note. Schwab acknowledged, however, that Cathy acquired the liquor license, paid $5,000 toward the purchase of the business, signed a security agreement encumbering her property, and signed a note obligating her to pay the purchase price of the business. According to Cathy, Schwab put the liquor license in Cathy's name because "he suffers from a brain

tumor and in the event he passes away it would be difficult to transfer the liquor license through probate."

Although the terms of the agreement do not so provide, Schwab testified he understood Cathy owned the *entire* business at the time escrow closed, and for a period of 10 months.[10] During that period, Schwab stated, T. J. Kristi managed the business and kept the profits from the business; Cathy received the profits from the liquor sales.[11] According to Schwab, at the end of the 10-month period Cathy sold the business to Schwab, although no money was paid, there was no escrow, no bill of sale, no notice of bulk transfer, and no communication to the Department of Alcoholic Beverage Control (ABC).

T. J. Kristi manages PF&L but does not charge Cathy a management fee. According to Schwab, this is because Cathy owns the ABC license, but not the business. Schwab works at PF&L 25 to 40 hours per week; he is not compensated with wages, but receives profits from the business through T. J. Kristi. Cathy works at PF&L approximately 8 to 10 hours per week and also does not receive compensation. Schwab is an enrolled agent and prepares all of Cathy's accounting and tax work.

b. George's Evidence Regarding Ownership of PF&L

George presented testimony from the district administrator of ABC, Mr. Robillard. His testimony, and the pertinent ABC file documents, showed that: Cathy applied for the liquor license; Cathy stated she was the "sole owner" of the premises; and Cathy stated she was the owner of the entire business, "[a]ll the inventory, all the fixtures, all the business, including but not limited to the sale of alcoholic beverages." Robillard testified that ABC does not normally, and did not in this case, approve the transfer of the license separate from the business; that "hidden ownership" of a liquor license is illegal; that ABC was not aware of the agreement between Cathy and Schwab regarding ownership of

[10] The 10-month period mirrors the time remaining on the noncompete clause.

[11] In his deposition, Schwab stated that T. J. Kristi had kept all of the profits during that period.

the business; and had it known, it would have been alerted to a possible violation of ABC rules against hidden ownership. Cathy did send a letter to ABC stating that T. J. Kristi would be managing the business and that Schwab helped her make the down payment for the business and she is not expected to repay those funds. This letter suggested to Robillard that others would be managing the business but that was different from ownership.

George also offered the testimony of the escrow officer who handled the closing of the PF&L purchase. Her records showed that Cathy was designated as the buyer of PF&L on the bulk transfer notice (used to notify the seller's creditors), in the escrow instructions, on the bill of sale, and on the UCC-1 financing statement, as well as other documents. Cathy also signed, as the buyer, a security agreement, encumbering all of the assets of PF&L, including all furniture, fixtures and equipment, and signed as the obligor on the promissory note. Cathy herself acknowledged that she signed all of the documents pertaining to the purchase of PF&L.

George also produced evidence of Cathy's inconsistent statements relating to her income. Cathy did not report any income from PF&L on her income and expense declarations filed in 2000 and 2001. Also, during a prior hearing in August 2001, pertaining to her request for attorney fees, Cathy testified that she did not receive income from PF&L, because the business was hers "by name only," and that T. J. Kristi reported all of the PF&L income on its tax returns. But in a May 2002 declaration, Cathy stated that she was entitled to receive income from PF&L's liquor sales, and had reported such income in her 2000 tax returns.[12]

[12] Cathy's credibility was also called into question based upon other factual discrepancies. For example, for purposes of the PF&L security in January 2000, she represented the value of her rental property to be $320,000, but in her June 2001 income and expense declaration she said it was worth only $250,000. Her explanation for this disparity was: "I really don't . . . know the value of the home and probably gave two different answers for it." She also claimed she was paying a small amount—about $300 per month—to Schwab for rent, utilities and other expenses. Schwab, however, testified she does not pay him rent either by check or in cash.

In order to prove Cathy's income, George presented expert testimony regarding the cash flow from PF&L. Relevant details of this testimony will be discussed later in this opinion. (See part III.E., *post*.)

3. Trial Court's Rulings

After receiving closing briefs, Cathy's objections to George's brief, and George's reply, the court issued a lengthy and detailed "Statement of Tentative Decision on Financial Issues." As pertinent here, the findings were as follows:

The court determined there were three time periods for which support should be calculated. The first period, "T1," commenced when George filed his motion to modify support (May 23, 2000) and ended when George received his personal injury recovery from Kmart (May 2001). The second period, "T2," began in June 2001 and ended in June of 2003, when the court issued its order substantially altering the amount of time each parent had with the children. "T3" is the period commencing after June 2003.

a. Findings Regarding George's Income

The court found that, for the year comprising T1, George's financial circumstances were "in turmoil." Although he had won a substantial verdict from Kmart, the case had been appealed, and the benefit of the judgment had not yet arrived. Because the verdict was not "so liquidated as to constitute a basis for an imputed return," the court relied on George's evidence of his actual income for T1. With respect to T2 and T3, the court found that George's use of his wealth to increase the value of his assets rather than to generate a stream of income "is not in the children's best interest" and, therefore, the court imputed income to George at a rate of 5.5 percent per year for his real estate holdings and at the rates of 2.2 percent and 1.4 percent per year in T2 and T3, respectively, for his savings, stocks and bonds.

b. Findings Regarding Cathy's Ownership of PF&L

With respect to Cathy, the court recited the conflicting evidence regarding her interest in PF&L. It concluded that Cathy's credibility on the subject was "questionable" and therefore "all financial inferences regarding Portola Food & Liquor, which are disputed, will be resolved against [her]." The court ascribed to Cathy all of the PF&L

income, relying on the expert testimony as to PF&L's cash flow, and discounting that sum by 15 percent to account for management services provided by Schwab and amortization of the initial investment.

c. Findings Regarding Attorney Fees

With respect to attorney fees: George had requested fees as a sanction under section 271; Cathy had requested fees based upon need and ability to pay and asked the court to take into account George's overlitigation of the custody and visitation issues. After a lengthy discussion of the law and its underlying policies and of the evidence before it, the court concluded that "[b]oth parties are entitled to attorney's fees under their respective theories" but that "an award to both parties would offset the other, [so] the court is not going to make an award to either party."

d. Rulings on Objections

George filed objections to the statement of tentative decision and Cathy requested further findings (characterized by the court as objections). George filed a response to Cathy's request. The court issued its ruling on the objections and request for further findings. It made certain adjustments to the calculation of George's imputed income and to his time share with the children for T2, but overruled all other objections.

Among those objections was Cathy's claim that, by ascribing to her full ownership of PF&L, the court had violated the statute prohibiting the use of new mate income in calculating child support (§ 4057.5, subd. (a)(2)).[13] The court's response is noteworthy: "[W]hile the court cannot say that [Cathy] committed outright perjury, her credibility in the providing of financial information has not improved since Judge Sheppard's prior sanctions. She has continued to supply the court with half-truths and misinformation.

[13] Section 4057.5, subdivision (a)(2) provides: "The income of the obligee parent's subsequent spouse or nonmarital partner shall not be considered when determining or modifying child support, except in an extraordinary case where excluding that income would lead to extreme and severe hardship to any child subject to the child support award, in which case the court shall also consider whether including that income would lead to extreme and severe hardship to any child supported by the obligee or by the obligee's subsequent spouse or nonmarital partner."

Under the circumstances no reasonable trier of fact could rely upon the information she has provided. To compound her position concerning her financial relationship with Mr. Schwab/T.J. Kristi, the evidence presented was that Mr. Schwab, who is a former enrolled agent, created a financial labyrinth which included his taking control of [Cathy's] financial affairs and setting up a system of multiple bank accounts that would confuse anyone. . . . The burden was on her to present evidence that was distinct, intelligible and beyond the reproach of her personal credibility that her 'secret' partners were entitled to a share of the income generated by Portola Food and Liquor and that they were not by implication shouldering the burden of the support for the two children. [Cathy] has failed to meet that burden and she must bear the resultant financial consequences. One cannot complain that the court did not find the correct economic relationship between these associates when the true and complete economic relationship was not presented."

e. Trial Court's Order

On January 23, 2004, the court issued its final statement of decision. The court calculated child support as follows: for T1, Cathy owed George $241 per month; for T2, George owed Cathy $685 per month; for T3, George owed (and continues to owe) Cathy $99 per month. The order after hearing was filed on June 11, 2004. Cathy appealed.

II. STANDARD OF REVIEW

A decision modifying a child support order will be affirmed unless the trial court abused its discretion, and it will be reversed only if prejudicial error is found upon examination of the record. (*In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1150-1151.) "Although precise definition is difficult, it is generally accepted that the appropriate test of abuse of discretion is whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered. [Citations.] . . . [W]hen two or more inferences can reasonably be deduced from the facts, a reviewing court lacks power to substitute its deductions for those of the trial court." (*In re Marriage of Connolly* (1979) 23 Cal.3d 590, 598.) The burden is on the complaining party to establish abuse of discretion. (*Blank* v. *Kirwan* (1985) 39 Cal.3d 311, 331.) The

showing on appeal is insufficient if it presents a state of facts which simply affords an opportunity for a difference of opinion. (*In re Marriage of Varner* (1997) 55 Cal.App.4th 128, 138 (*Varner*).)

"We observe, however, that the trial court has 'a duty to exercise an informed and considered discretion with respect to the [parent's child] support obligation . . . .' [Citation.] Furthermore, 'in reviewing child support orders we must also recognize that determination of a child support obligation is a highly regulated area of the law, and the only discretion a trial court possesses is the discretion provided by statute or rule. . . .' [Citation.] In short, the trial court's discretion is not so broad that it 'may ignore or contravene the purposes of the law regarding . . . child support. . . .' [Citation.]" (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 282-283.)

Our review of the trial court's findings of fact is limited to determining whether they are supported by substantial evidence. (See *In re Marriage of Schulze* (1997) 60 Cal.App.4th 519, 529 (*Schulze*).)

III. DISCUSSION

A. Should the Entire Proceeds of George's Personal Injury Recovery Be Treated as Income for Child Support?

Cathy first argues that because the statute defining income for purposes of child support does not exclude personal injury recoveries, the "principal sums" recovered by George from Kmart should have been included in the support calculations, just as lump-sum lottery winnings are included. The fact that the award is not treated as taxable income, Cathy argues, is irrelevant.

We observe that this contention was not squarely raised below.[14] This would normally preclude our consideration of it. (*G & D Holland Construction Co. v. City of Marysville* (1970) 12 Cal.App.3d 989, 996-997.) But here, the theory has been thoroughly briefed, and presents an important issue of public policy. Further, the parties do not disagree as to the relevant facts. Accordingly, we will proceed to adjudicate it. (*Raphael v. Bloomfield* (2003) 113 Cal.App.4th 617, 621 [a reviewing court may consider points not raised at trial when important issues of public policy are involved or when a contention newly made on appeal presents a question of law].)

To begin with, we agree with Cathy that the Internal Revenue Code's exclusion of personal injury recoveries from taxable income is not controlling. Workers' compensation payments, for example, are also excluded from taxable income (Int.Rev. Code, § 104(a)(1)) but are included as income under Family Code section 4058.

The plain language of section 4058, which defines income for purposes of child support, does not speak to personal injury recoveries.[15] True, the statute is broad and uses inclusive language, viz., "[t]he annual gross income of each parent means income from whatever source derived . . . and includes, but is not limited to, the following: [¶]

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[14] Cathy hinted at this argument in a footnote in her closing brief: "The four income sources [identified by the trial court] do not include the most important element of Mr. Heiner's income during the relevant time frame and that is the principal amount of the 3.8 million dollar K-Mart Judgment. The Court's repeated refusal to consider evidence . . . that the judgment amount was composed in whole or in part of claimed lost income by Mr. Heiner and his own admissions of his post injury earning capabilities is more than just perplexing to [Cathy] and her counsel!"

[15] Section 4058 provides, in pertinent part: "(a) The annual gross income of each parent means income from whatever source derived . . . and includes, but is not limited to, the following: [¶] (1) Income such as commissions, salaries, royalties, wages, bonuses, rents, dividends, pensions, interest, trust income, annuities, workers' compensation benefits, unemployment insurance benefits, disability insurance benefits, [and] social security benefits . . . . [¶] (2) Income from the proprietorship of a business, such as gross receipts from the business reduced by expenditures required for the operation of the business. [¶] . . . [¶] (b) The court may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children."

. . . [i]ncome such as . . . annuities, workers' compensation benefits, . . . disability insurance benefits, [and] social security benefits." (§ 4058, subd. (a)(1).) But it has not been read so expansively as to encompass every financial payout. For example, courts have held that life insurance proceeds (*In re Marriage of Scheppers* (2001) 86 Cal.App.4th 646 (*Scheppers*)), student loans (*In re Marriage of Rocha* (1998) 68 Cal.App.4th 514), inter vivos gifts (*Schulze*, *supra*, 60 Cal.App.4th at p. 529), and testamentary gifts (*County of Kern v. Castle* (1999) 75 Cal.App.4th 1442, 1453-1454 (*Castle*)) are not income within the statutory definition of section 4058. The common thread in these cases is that such payments do not meet the generally accepted definition of income, that is, "the gain or recurrent benefit that is derived from labor, business, or property [citation] or from any other investment of capital [citation]." (*Scheppers*, *supra*, 86 Cal.App.4th at p. 650.) In contrast, lottery winnings do constitute income because gambling proceeds are in the nature of a return on the investment of capital. (Cf. *County of Contra Costa v. Lemon* (1988) 205 Cal.App.3d 683, 688.)[16] Applying this approach, we examine the nature of the payment.

In George's case—not unlike the usual personal injury case—the jury was instructed on five components of damages: "medical expenses, past loss of ability to work, present value of lost future 'earning capacity,' pain and suffering, and emotional distress resulting from financial injury." (*Kmart*, *supra*, 84 Cal.App.4th at p. 343.) None of these components is a gain or recurrent benefit that is derived from labor, business, property or investment of capital. For the most part, personal injury awards are not intended as a gain at all, but as an attempt to make the injured party whole for losses incurred—both physical and financial—due to the injury. We recognize that past and future loss of earning capacity might well be considered a substitute for wages or earned income, akin to disability or workers' compensation benefits which are included in the

[16] One case has restricted *Lemon's* interpretation of section 4058 to public benefit cases where the obligor's actual income was insufficient to meet minimum support standards. (*Castle*, *supra*, 75 Cal.App.4th at pp. 1448-1454.)

definition of income. But in this case, those damages were not separately awarded because neither party requested a special verdict with respect to the damages (*id.* at p. 346), and the settlement agreement also provided for an unallocated payment. Under these circumstances, the *entire* amount of a lump sum, undifferentiated personal injury award or settlement is not income.[17]

This conclusion is congruent with the fact that future economic losses are awarded at a discounted value. (BAJI No. 14.70.) Thus, the law presumes that the amount awarded by the jury in year one will be invested to produce sufficient proceeds to fully compensate the injured party over his or her lifetime. (See, e.g., *Ches. & Ohio Ry. v. Kelly* (1916) 241 U.S. 485, 489-490.) If 100 percent of a personal injury award were deemed income when received, and if child support were calculated based upon that number, the injured party would be unjustly deprived of the capital needed to produce the additional compensation to which he or she is entitled.

We have also considered Cathy's cited authorities and find them inapposite. In *Butler v. Butler* (Pa.Sup.Ct. 1985) 488 A.2d 1141, 1142, *In re Marriage of Fain* (Colo.Ct.App. 1990) 794 P.2d 1086, and *In re Jerome* (N.H. 2004) 843 A.2d 325 (*Jerome*), the appellate courts upheld the lower courts' decisions to treat the parents' personal injury recovery as income; but all three cases involved either annuity payments or structured settlements.[18] Thus, the courts in *Butler*, *Fain*, and *Jerome* did not treat *lump sum* tort awards or settlements as income. (See, e.g., *Jerome, supra,* 843 A.2d at p. 330 ["A lump sum settlement is akin to an asset, [citation], while annuity payments provide a regular income flow. Under [New Hampshire's] legislative scheme, assets are not 'income' for child support purposes. [Citation.]"].)

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[17] A separate question, discussed *post*, is whether a portion of the lump sum payment can be allocated as compensation for lost income and then treated as income for purposes of child support.

[18] A structured settlement provides for periodic payments by the tortfeasor or its insurer to the injured party in satisfaction of his claim. (*Ringler Associates Inc. v. Maryland Casualty Co.* (2000) 80 Cal.App.4th 1165, 1170, fn. 1.)

The fourth case Cathy cites, *Villanueva v. O'Gara* (Ill.Ct.App. 1996) 668 N.E.2d 589 (*Villanueva*), presents a different scenario. There, a father received a lump sum, undifferentiated settlement as damages for injuries suffered to his hand. (*Id.* at p. 591.) The trial court treated the entire amount as income for purposes of child support and the father appealed. (*Ibid.*) The Court of Appeal reversed, holding that the entirety of a personal injury settlement could not be considered income, because it serves primarily to make the injured person whole, and does not represent a " 'gain or profit.' " (*Id.* at pp. 591-592.) In *Villanueva*, the parties had *agreed* that the settlement included a component representing lost earnings, but could not agree as to the amount, so the court remanded "to determine that portion of the respondent's settlement which was or should have been apportioned to replace the respondent's past and future lost earnings." (*Id.* at p. 593.)

Villanueva thus does not support Cathy's position that 100 percent of George's personal injury award should be considered income. Indeed, the *Villanueva* court did not even hold that any component found to represent reimbursement for lost earnings *must* be considered income for purposes of child support, but only that it *may* be so considered. (*Villanueva, supra*, 668 N.E.2d at p. 593.) In so holding, the court also did not rule out the possibility that an apportionment might not be possible where it would be too speculative. (*Id.* at pp. 594-595.)

Other courts have concluded that lump sum personal injury payments are not income. In *Kelly v. Kelly* (La.Ct.App. 2000) 775 So.2d 1237, 1243-1244, the court held that receipt of a lump sum settlement, as opposed to regular periodic payments, consists of a "fund" (which is capital) not a "flow" (which is income), but that interest or other returns from the fund are income. Similarly, in *S.G. v. D.M.* (N.Y.Fam.Ct. 1996) 653 N.Y.S.2d 525, 526, the court concluded that monthly payments from a structured settlement were income, but lump sum payments made as part of the settlement were not income.

In harmony with all these authorities, we conclude that the entirety of an unallocated, lump sum personal injury settlement or award is not income for purposes of section 4058.

B. Did the Trial Court Abuse Its Discretion in Failing to Allocate a Portion of George's Recovery as Income?

Cathy next contends that if the entire amount of George's recovery is not income, the court "deviated from the statutory guideline" in "refus[ing] to consider" that at least some portion of George's personal injury recovery was income. Actually, the court did not "refuse[] to consider" that a portion of the recovery might be treated as income; rather, the court concluded it would be impossible to make the requested allocation. The issue before us is whether George's personal injury recovery is reasonably subject to an allocation as among the various components of damages.

Cathy's argument is predicated on the assumption that the components of a personal injury award intended to be compensation for loss of income and loss of earning capacity may be considered by the court as income for child support. George does not dispute this premise, nor do we. Although such revenue does not derive from investments of labor, business or property (*Scheppers, supra*, 86 Cal.App.4th at p. 650), damages for loss of income or earning capacity are unquestionably a substitute therefor. As such, they may be considered as income under section 4058. The disputed question here is whether the trial court is *required* to include such damages in the income calculation. We conclude, as have our sister courts, that this is necessarily a fact-driven determination. Accordingly, it is best left to the discretion of the court, considering all the evidence before it.

In *Whitaker v. Colbert* (Va.Ct.App. 1994) 442 S.E.2d 429, 431 (*Whitaker*), for example, a parent received a personal injury settlement that " 'was not apportioned as to amounts attributable to pain and suffering, permanent injury or disability, lost wages, lost earning capacity or future medicals . . . .' " The underlying case included claims for lost earnings, medical expenses, loss of earning capacity, disability, injury, and pain and suffering. However, because there was no evidence to "elucidate the merits of any of these claims," the trial court found " 'it would be speculative at best as to how to attribute any part of that settlement to prior lost wages as opposed to the other elements of damages.' " (*Ibid.*) The appellate court affirmed, concluding that the evidence supported

that determination. (*Id.* at pp. 430-431; see also *Mehne v. Hess* (Neb.Ct.App. 1996) 553 N.W.2d 482, 488 [proper allocation of lump sum settlement as between income and other components of compensation depends on the facts and circumstances of each case in order to achieve a fair result]; *Good v. Armstrong* (Mich.Ct.App. 1996) 554 N.W.2d 14, 16 ["the question whether a personal injury settlement should affect the level of child support depends on the particular facts of each case and, thus, should be decided case by case"].) And, because the issue involves fact finding upon evidence, the burden of proving allocation would lie with the party requesting it. Thus, for example, the party seeking to include in the child support calculation a portion of a personal injury award representing lost income or earning capacity must present sufficient evidence upon which the allocation can be made. Similarly, the party wishing to *exclude* from a personal injury award treated as income some allocable portion for pain and suffering or future medical costs bears the burden of presenting sufficient evidence for that determination. (See, e.g., *Taranto v. Dept. of Social Services* (Mo.Ct.App. 1998) 962 S.W.2d 897, 902-903 [court has discretion to adjust child support if the amount is "unjust and inappropriate" where portion of annuity payments was intended—and needed—to pay for ongoing medical treatment].)

In this case, little was offered to support an allocation. Indeed, the only evidence offered—and this, at the close of trial—was a transcript of the testimony of George's two economic experts in the personal injury trial.[19] In those proceedings, one expert testified George would suffer $12 million in lost profits over his lifetime due to his inability to practice dentistry, with a present value of $8 million. (*Kmart, supra,* 84 Cal.App.4th at pp. 341-342.) A second expert testified that the present value of George's net income loss would be $4.8 million if he returned to school to obtain an MBA degree and then began a new career using his degree and the "management skills that he's picked up over the last few years."

[19] Prior to the close of trial, Cathy had requested that the court take judicial notice of this testimony as relevant to other issues, such as George's earning capacity.

The colloquy pertinent to Cathy's request was brief: "[Cathy's Counsel]: I would like to renew my request that the Court take judicial notice of those transcripts that you . . . denied . . . previously . . . . Those were the testimony of . . . the experts in the underlying Kmart litigation, who testified that Mr. Heiner's damages of $8 million for lost wages. I want to renew my request that the Court take judicial notice of that, that the proceeds from Kmart were, in fact, for lost wages. Mr. Heiner's own testimony, and as I agree, the verdict did not specify, although he had asked for $8 million in lost wages, he recovered 3.8. [¶] [George's Counsel]: There is — there is no evidence of that, and the Court of Appeal[] soundly rejected that whole argument. It was an undemarcated judgment. There was no indication what the jury applied to what. . . . [¶] The Court: I'm — you know, I'm familiar with the way the personal injury . . . awards are awarded. I don't think I can read into that. Clearly, a portion of the — of the judgment, your claiming lost wages and future lost wages, for me to allocate that would be an impossibility; so I'm going to deny that request."

On this record, any attempt to allocate George's recovery among all the elements of his damages would be pure speculation.[20] Cathy offered to the court from the *Kmart* proceedings *only* the plaintiff's expert testimony on loss of profits and loss of net income. This presents such an incomplete picture of George's total damages, that anything other than an arbitrary apportionment would be impossible. (See *Whitaker, supra*, 442 S.E.2d at p. 431 [allocation could not be made because there was no evidence to "elucidate the merits" of the various damage components].) Cathy did not offer any other excerpts from the *Kmart* trial—no testimony describing George's pain and suffering; no evidence of George's medical expenses; no testimony as to George's emotional distress; and no

[20] Indeed, one of Kmart's contentions on its appeal was that the evidence regarding lost "future profits" was too speculative. Division Four of the First Appellate District held the issue had been waived. "Because Kmart failed to request a special verdict on the issue of damages, *we have no way of determining what portion—if any—of the $3.8 million was awarded as compensation for future profits*." (*Kmart, supra*, 84 Cal.App.4th at p. 346, italics added.)

evidence describing the injury itself—all of which were component parts of George's claim against the defendants. (*Kmart, supra*, 84 Cal.App.4th at pp. 347-348.) Cathy also offered none of the testimony introduced at trial by Kmart, which—for all we know—may have convinced the jury not to award *any* damages for lost income. In short, the state of the record wholly supports the trial court's refusal to make an allocation here.[21]

Our ruling does not preclude a different result in other cases. For example, if it is shown that a verdict or settlement was apportioned among the various elements of damages, or if the party seeking an allocation presents sufficient competent evidence to support a rational apportionment, the lost income and earning capacity portion of the verdict may be considered as income available for payment of child support. If it is so considered, the trial court will likely be faced with the corollary issue of how to calculate monthly income for guideline support where, as is the usual case, the lost earning capacity portion of an award is discounted to present value to compensate for income losses over the life expectancy of the injured party. We entrust these matters to the sound discretion of the trial court, to be exercised within the principles articulated in the governing statutes (see, e.g., § 4053), and after thorough consideration of all the facts and circumstances of the case.

C. Should a Portion of George's Lump Sum Personal Injury Recovery Be Treated as Interest Income?

Cathy argues the trial court erred in failing to include as income to George the interest earned on the judgment pending appeal. She argues, first, that although the interest was not paid during T1, it was earned during that period and therefore should be imputed to George as income for T1. The trial court rejected this argument. It ruled that "[w]hile [George] was able to support his endeavors [during T1] through borrowing against his 'assets[,'] those items were not so liquidated as to constitute a basis for an imputed return. If [George] had lost the appeal, the court would be looking at a much

[21] Because we hold the court properly ruled it could not make a rational allocation on the offer of proof presented, we need not discuss the evidentiary issues raised by George concerning Cathy's requests for judicial notice.

different financial picture . . . ." Cathy's response is that George's imputed interest income is just like any other kind of imputed earnings, e.g., where income from assets is imputed to a parent for purposes of calculating child support. (*In re Marriage of Destein* (2001) 91 Cal.App.4th 1385.) The income need not be "in hand" to be treated as such. Cathy misses the point. No one disputes that income from assets can be imputed, whether actually received or not. But in such cases, although the income is not "in hand," the assets are. Here, George had only a contingent interest in his verdict and the interest accruing on it, which would explain the astronomically high rate of interest he had to pay when he borrowed against it. The trial court's decision not to include the verdict's accruing interest pending appeal was not an abuse of discretion.

Cathy argues, in the alternative, that the recovery was paid in T2 and, therefore, the portion reflecting interest should have been treated as income for T2. Because George admitted to receiving about $551,000 more than the verdict amount, Cathy contends the trial court erred in failing to include that amount as income.

The trial court ruled that Cathy failed to prove there was an interest portion of the settlement. This is supported by the terms of the settlement reciting that the total sum was paid as "damages on account of physical and personal injuries." The trial court also found Cathy failed to demonstrate that any sums paid to George in excess of the verdict amount were not offset by additional expenses incurred by George during the appeal. This finding is supported by evidence of the appeal costs incurred and the extensive debt George repaid upon receipt of the recovery. Cathy argues that George's debt payments are irrelevant to his receipt of interest income, and should not provide any offsets. But she cites no authority for this contention and we are aware of no such restrictions on the trial court's discretion. Nor can we say the court's rationale was beyond the bounds of reason. Interest accrues pending appeal by law. (Code Civ. Proc., § 685.010, subd. (a).) Presumably, as with prejudgment interest, this is to compensate the winning party for the loss of use of the funds. (Cf. *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 663-664 & fn. 14 [one purpose of prejudgment interest is to provide just compensation to the injured party for loss of use of the award, that is, to make the

plaintiff whole as of the date of the injury].) If, due to an appeal and the unavailability of the funds awarded at trial, a party is forced to incur additional expenses (such as increased debt at high interest rates or fees for an appellate attorney), it is not irrational for the court to allow an offset for those expenses when ascertaining income under section 4058.

D. Did the Trial Court Err in Excluding the Transcript of the Expert Testimony in the Personal Injury Trial to Prove Earning Capacity?

As noted above, Cathy's attorney requested that the trial court take judicial notice of the testimony of George's economic damage experts in the personal injury trial. Focusing on the testimony that George could mitigate his loss of income as a dentist by returning to school to earn an MBA and securing a job in the corporate arena, Cathy's counsel argued that George's failure to pursue an MBA penalized the children. It appears he was arguing, in effect, that the court should admit the expert testimony from the personal injury trial as proof of George's earning capacity. George's counsel objected, arguing that earning capacity is relevant only when it is shown that a person is "intentionally not pursuing job opportunities or intentionally diminishing his earning capacity. There is no evidence to that effect." The court deferred its ruling to allow Cathy's attorney to present such evidence.

Testimony was then elicited from George describing his efforts to earn income and choose a new career path. George testified at length concerning his attempts to successfully operate an Internet website design and maintenance company (Club 2000) which he had started prior to 1999. George stated that as of July 2003 the business still existed, and he still attended to some duties there, but that it had no value.

George testified to the following efforts and activities after he received the Kmart settlement in 2001: George first looked into reeducation as a real estate agent. He began listening to the training tapes and began applying what he learned as he purchased properties. He decided being a real estate agent or mortgage lender would not be a "good fit" because the paperwork is so tedious. George also investigated the possibility of entering an MBA program, but concluded the courses were "too dry," did not tap into

George's type of creativity, and did not involve one-on-one interaction with the public, which is what he liked about dentistry. George also had been cowriting a book about suicide prevention and was hoping to integrate that into a career in community service. He was invited to a "summit" cosponsored by the White House and the Ann Berg Center in Los Angeles, and was receiving positive feedback from other persons concerning his ideas, so he decided he would enter that field. George anticipates completing course work at the University of Phoenix and going on to California State University East Bay to earn an "MFT" to become a school counselor.[22] At the time of the July 2003 hearing, George was earning some income as a real estate investor, and was managing his own properties. As of July 30, 2003, George had not applied for any employment.

Cathy's request for judicial notice was not renewed after this testimony was elicited. It appears the request got lost in the shuffle because we cannot locate any ruling on it, although at the close of testimony, Cathy's attorney stated it was his recollection the court had denied his request.[23] In any event, on appeal Cathy contends that judicial notice of the experts' testimony should have been granted to prove George's earning capacity, because George's "reluctance or inability to find any gainful employment justified admission into evidence of the prior statements."

The basic rule is that actual income will be deemed to be the party's earning capacity. (*County of Yolo v. Garcia* (1993) 20 Cal.App.4th 1771, 1783.) The law does allow imputation of income to a parent based upon earning capacity. (*In re Marriage of Regnery* (1989) 214 Cal.App.3d 1367, 1372-1373.) But this occurs where it is shown the parent is "unwilling to work despite the ability and opportunity" to do so (*In re Marriage of LaBass & Munsee* (1997) 56 Cal.App.4th 1331, 1338), that is, where the parent is voluntarily unemployed or underemployed (*In re Marriage of Everett* (1990) 220

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[22] "MFT" apparently refers to a license in marriage and family therapy. (See http://www.csueastbay.edu/ecat/20052006/g-epsy.html#section3.)

[23] He then renewed the request for a different purpose—to prove that the award was for lost income—and that request was denied. (See part III.B., *ante*.)

Cal.App.3d 846, 859). Thus, a court may, in its discretion, consider earning capacity in lieu of income, and "[i]n the course of exercising this discretion, the court may consider arguments concerning the payor's motivations or the reasonableness of the payor's actions in light of all the relevant circumstances." (*In re Marriage of Hinman* (1997) 55 Cal.App.4th 988, 999.) Applying these principles, we discern no error.

With respect to the T1 period, the trial court declined to consider earning capacity because George's "efforts to make Club 2000 a viable enterprise under his then circumstances and the short period that this was his primary endeavor justifies limiting his income potential to those efforts." This is a factual finding that is supported by substantial evidence; we will not revisit it. Because the court declined to consider earning capacity, the expert's testimony was irrelevant.

The court did not make a specific finding with respect to George's *employment* earning capacity in the T2 and T3 periods, but did impute earnings to George's activities as an investor. It is unclear whether Cathy argues here, or if she argued below, that the court should have imputed employment earning capacity to George instead of imputing income to his assets. Assuming she does, we cannot say the trial court abused its discretion in failing to do so. The testimony showed that George was essentially self-employed as a real estate investor and active manager of his assets. Cathy did not prove that George was either unwilling to work or underemployed. Nor was there any showing that George's earning capacity as testified to by the expert would be greater than the income imputed to him by the court. Indeed, Cathy promoted the arbitrary amount of $4,000 per month as George's earning capacity, yet the court imputed monthly income in the amounts of $4,994 and $5,463 for T2 and T3, respectively. Cathy has demonstrated no prejudice to her or to the children. Whether or not we would have taken the approach chosen by the trial court to determine George's income, we cannot say its choice was irrational or that it contravened the purposes of the child support law. Accordingly, the

expert's testimony in the underlying personal injury trial was properly excluded as irrelevant.[24]

E. Did the Trial Court Violate Section 4057.5, Prohibiting Consideration of New Mate Income, When It Found That Cathy Owned PF&L?

Cathy argues the trial court erred in "imputing" to her an asset of her new mate, Schwab, in contravention of section 4057.5. Her argument hinges entirely on the court's finding that Cathy, rather than Schwab or T. J. Kristi, owns PF&L. This being a finding of fact based upon disputed evidence, Cathy has a significant burden to carry in proving error. "When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.* [Citations.] [¶] Applying the foregoing criteria and disregarding contrary arguments of the parties, we

[24] Cathy also contends the expert's testimony should have been admitted under the principle of judicial estoppel, to preclude George from presenting an inconsistent claim with respect to his earning capacity in the subsequent family law proceeding. As pointed out in George's brief, however, the claims are not necessarily inconsistent. Had George claimed he was unable to work, the doctrine might have applied here. (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181 [" ' "Judicial estoppel is 'intended to protect against a litigant playing "fast and loose with the courts." ' " ' [Citation.] It seems patently 'wrong to allow a person to abuse the judicial process by first [advocating] one position, and later, if it becomes beneficial, to assert the opposite.' "].) But the fact that an expert testified George *could have* obtained an MBA and begun a new career in business does not estop George from seeking a different career path. Cathy's having failed to show that George's actual (imputed) income could not be reconciled with the expert's testimony regarding his earning capacity, the testimony was irrelevant.

look to the *entire record* for *substantial evidence* supportive of the trial court's findings of fact." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.)

Cathy argues that because most of the funds to purchase the asset came from Schwab, and because he spends a significant number of uncompensated hours working at PF&L, the trial court should not have ascribed to Cathy all of the income from the business. In making this argument, Cathy glosses over the substantial evidence that supports the trial court's finding that she was the true owner. There was a sharp conflict in the evidence on this issue.

On the one hand, Cathy and Schwab produced an agreement reciting that Cathy was the owner in name only. Schwab also testified (inconsistently) that Cathy owned the liquor license only and its placement in her name was an estate planning device. George, on the other hand, presented a significant body of documentary evidence that Cathy was the owner of the entire business, not just the liquor license. This included Cathy's letter to ABC to "explain Mr. Schwab's role in *my* business" (italics added). The letter stated that Schwab, through T. J. Kristi, would be the manager of the business and that Schwab had lent her the money for much of the down payment, but was not expecting repayment. The clear implication is that Schwab's contribution to the purchase price was a gift to Cathy, not evidence of his ownership.

Faced with this conflicting evidence, the trial court chose to resolve all disputed issues regarding PF&L against Cathy. The court had reason to question Cathy's credibility. Cathy signed court documents in 2000 and 2001 stating she received *no* income from PF&L in 2000 and 2001, and made the same representation in a proceeding in August 2001. But in a May 2002 declaration, she stated that she was entitled to receive income from PF&L's liquor sales, and had reported such income in her 2000 tax returns. Schwab then testified, inconsistently, that Cathy owned the *entire* business for 10 months in 2000.

As the trial court stated, "[t]he burden was on [Cathy] to present evidence that was distinct, intelligible and beyond the reproach of her personal credibility that her 'secret' partners were entitled to a share in the income generated by Portola Food and Liquor and

that they were not by implication shouldering the burden of the support for the two children. [Cathy] has failed to meet that burden and she must bear the resultant financial consequences. One cannot complain that the court did not find the correct economic relationship between these associates when the true and complete economic relationship was not presented."

The trial court's decision on this issue was unquestionably supported by substantial evidence. At most, Cathy presented " 'a state of facts . . . which . . . merely affords an opportunity for a difference of opinion.' " (*Varner*, *supra*, 55 Cal.App.4th at p. 138.) This does not demonstrate reversible error.

Cathy makes a related argument that the trial court erred in deducting only 15 percent from PF&L's cash flow to account for "Mr. Schwab's services and return of capital." Cathy argues that the amount is "arbitrary" because (1) it is substantially less than the actual amount of amortization the business is entitled to deduct, and (2) it does not allow "any sum for the 25-40 hours worked per week by Mr. Schwab."

Cathy's argument fails for lack of proof. The only testimony on the subject of amortization came from George's expert, Mr. Moreland. He testified that he prepared a cash flow analysis of the PF&L business by calculating net income and adding back amortization and depreciation. Under cross-examination, the expert agreed that it was appropriate to amortize the purchase because "[m]uch of the purchase price was goodwill," and that this was a "real expense that would have been realized by whoever owned the business." The expert further explained, however, that although these are legitimate expenses that can be deducted on tax returns, they are not cash expenses. Cathy did not offer any evidence, expert or otherwise, that Moreland's cash flow analysis was defective or failed to paint a true picture of the income from PF&L. Nor did she offer any evidence regarding the value of Schwab's services to PF&L.[25] Nor does she present any authorities to support her theory that the court's determination was legally

[25] Moreland was asked, but could not provide an opinion on, what a reasonable management fee would be.

flawed. Given the state of the record, the court reasonably could have included the entire cash flow, without deduction, as Cathy's income. Cathy cannot complain that the court, on its own initiative, deducted 15 percent, which the court deemed to be a reasonable allowance for Schwab's services and return of capital.

F. Did the Trial Court Err in Refusing to Award Cathy Attorney Fees?

" 'The trial court has broad discretion to award attorneys' fees and costs in a dissolution action. The court's decision will not be disturbed on appeal absent a clear showing of abuse of discretion.' [Citation.]" (*In re Marriage of Hargrave* (1995) 36 Cal.App.4th 1313, 1323.)

Cathy argues she should have been awarded fees pursuant to section 2030 based upon her need and George's ability to pay. Cathy contends, and we agree, that George has a greater ability to pay for attorney fees based upon his net worth. But Cathy completely ignores the *grounds* upon which the trial court denied her fee request. Cathy's request was denied, not because she did not satisfy the criteria of section 2030, but because George was also entitled to a fee award as a sanction, pursuant to section 271. The court found that because these awards would essentially offset each other, no award would be made to either party. Cathy presents no argument challenging that ruling.[26] Accordingly, it will be affirmed.

IV. DISPOSITION

The order is affirmed.

[26] Cathy makes a passing argument that George's insistence on litigating the custody and visitation schedule resulted in additional hearings. But she uses this contention only to buttress her claim for fees under section 2030, and does not contend that this warrants fees as a sanction under section 271.

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RIVERA, J.

We concur:

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REARDON, Acting P. J.

_____
SEPULVEDA, J.

Trial Court:	Superior Court of Alameda County
Trial Judge:	Honorable Daniel Grimmer
Attorney for Appellant:	William F. Burns
Attorney for Respondent:	Garrett C. Dailey